63

(1)

Supreme Court, U.S.
FILED

No. 07-___

07 - 415 MAY 14 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

RUDOLPH COLE, PRO SE LITIGANT,

Petitioner,

v.

UNITED PARCEL SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RUDOLPH COLE, Pro Se Litigant
22322 Mosselle Court
Hayward, CA 94541
(510) 537-3482

QUESTIONS PRESENTED

29 U.S.C. § 623(4)(a)(d) and 29 U.S.C. § 621(2) of the Age Discrimination in Employment Act of 1967 (A.D.E.A.) which defines the guidelines for violations for this act against employees who are discharged over forty (40) years of age, because of not being able to meet the requirements of younger employees productivity.

The respondent alleged that my performance level was below average according to their computerized calculations of the assigned route. United Parcel Service initialized formula which includes all variables, such as amount of delivery stops per hour, amount of miles to complete the route, how long it takes to walk a package and how long it takes to pick up packages within an "eight hour day." At the end of each day a computerized document is generated from the data base which is called the "Morning Reports." On these reports it shows how much work was placed on the route and how long it takes an employee to do the route. For instance, the "Morning Report" will show the route had approximately eight hours (8) worth of work, but it took ten hours to complete the job. The respondent contends that actual hours I work took longer than what I was planned for. However, calculations were based off of younger drivers who did not take all of their meal periods and break periods according to the Collective Bargaining Agreement or in fact the law. Also, there were other variables involved that United Parcel Service calculations did not take into consideration, such as, Early A.M. routes.

QUESTIONS PRESENTED – Continued

The questions presented are:

Did the respondent take into consideration of age when formulating the calculation of each route? Does this violate A.D.E.A. § 621(2) and § 623(4)(a)(d), because the formula United Parcel Service used was based off of service providers that were under forty years of age to get a measurement of each route?

29 U.S.C. § 185(a) Labor Management Relations Act of 1947 and 42 § 2000e(5) of the Title VII under the Civil Rights Act of 1964 which defines the breach of contract under the Collective Bargaining Agreement. I was denied my rights to arbitrate my pending discharge case under the Grievance Machinery.

The respondent had hired an out agency to surveillance the route I was doing on February 18, 19 and 21 of 2003. After the three-day surveillance United Parcel Service took me off the job for alleged theft of time. The respondent had entered an information from the Diad board that was contrary to the C.B.A. which states under Article 37 § 1(d).

"No employee shall be disciplined for exceeding personal time based on data received from the DIAD/IVIS or other information technology" pg. 114.

After the panel upheld my pending discharge on September 11, 2003, it was discovered that all the information was not disclosed to the Union or myself.

QUESTIONS PRESENTED – Continued

Prior to September 11, 2003, I had a written request for all information that pertains to my discharge case. United Parcel Service partially exhibited information to me and the panel in which raises a pertinent question.

The questions presented are:

Did the respondent violate 29 U.S.C. § 185(a) Labor Management Relation Act of 1947 by introducing information produced by the Diad board? Did the respondent violate 29 U.S.C. § 185(a) Labor Management Relation Act of 1947 by only disclosing partial information to the panel?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 3
JURISDICTION 3
STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 4
REASONS FOR GRANTING THE WRIT 12

APPENDIX

Court of Appeals Opinion ..... App. 1
District Court ..... App. 3

TABLE OF AUTHORITIES

Page

CASES

Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317 (2000) 7, 8

Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) 11

Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999) 9

Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir. 1996) 8

Vaca v. Sipes, 386 U.S. 177 (1966) 12, 13

STATUTES

A.D.E.A. § 623(a) 8, 9

29 U.S.C. § 185(a) 2

29 U.S.C. § 621(2) 12, 13

29 U.S.C. § 623(4)(a)(d) 12, 13

PETITION FOR A WRIT OF CERTIORARI

The Ninth Circuit Court of Appeals did not examine the evidence of the fact that the calculations were based off of service providers that were under the age of (40) forty who do not take their required meal breaks. In effect a service provider at the age of forty will have to meet the same certiorari or standards as a service provider that is under the age of 40. The respondent admitted that they encouraged younger drivers to not take their meal periods for an increase of productivity in which this variable was not implemented in the calculations. Under the A.D.E.A. statute mandated that there shall be a non-discriminatory practice engaged under this provision.

The respondent never disputed the fact these calculations were based off of younger service providers productivity. Nor disputed the fact that even United Parcel Service Management questioned the calculations of the route in which the Ninth Circuit Court of Appeals overlooked that there were other assigned duties involved prior of doing the regular route such as Early A.M.

This was not calculated as being a part of the regular route. In effect the computerized report (Morning Report) will not input the other variables as part of the "eight hour planned day." United Parcel Service understood their practice of this policy was an impact based on age which placed a great disadvantage of older employees.

29 U.S.C. § 185(a) Under the Labor Relation Act of 1947 the Ninth Circuit never took into consideration that the respondent breached the contract by introducing data retrieved from the Diad board. The Diad board is a hand-held computer which it is designed to intake information from packages that are being delivered and picked up. It also has the capability to receive messages from the hub facility and send messages to the hub facility. The National Master United Parcel Service Agreement stated that it is prohibited to use any technology from the Diad/IVIS for disciplining employees for exceeding time. Contrary to the C.B.A. the respondent proceeded to use the information produced by the Diad Board. In addition to the breach of the contract the Ninth Circuit Court of Appeals never examined the evidence that was withheld from the panel prior to me being terminated. This information that was withheld would have proven that my testimony was true. The respondent had knowledge of another employee whom persuaded me into gaining more business. This information the Panel did not have the opportunity to review or question the other witness. There is in fact a serious misconduct on the behalf of United Parcel Service to mislead the panel in believing that the discharge had merit. In effect, the grievance machinery was not fully exhausted and the panel upheld my discharge. The Lower Courts' Honorable Breyers commented that it was not the duty of the District Court to scour through the evidence.

OPINIONS BELOW

The opinion of the district court granting summary judgment in favor of the respondent on the issue base on age on December 18, 2006.

JURISDICTION

A petition was filed on January 27, 2007. The Court of Appeals also denied me for a rehearing on February 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case concerns the meaning of sections of 621(2) and 623(4)(a)(d) of The Age Discrimination in Employment Act of 1967 (A.D.E.A.), 29 U.S.C. § 1054(B) and § 621(1)(2) governs the age discrimination which described the unfair work conditions for a person or persons of (40) forty years of age or older.

> (1) In the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons.

A.D.E.A. § 623(4)(a) also governs the age discrimination which described for termination of employment based on age and for opposing to such practice being conducted.

> (a) It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (d) It shall be unlawful for an employer to discriminate against any of his employees or applicants, for an employment agency to discriminate against any individual, or a labor organization to discriminate any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section;

This case concerns the meaning of this section 29 U.S.C. § 185(a) which defines a breach of contract which rises out of the Labor Management Relations Act of 1947.

STATEMENT OF THE CASE

One of the decision-makers, Bob Pedulla's testimony stated that I ran 3 to 4 hours over consistently on the assigned route (over allow is a terminology

that United Parcel Service uses to best describe the time frame between the "planned day and the actual hours an employee work day). For example, if an employee punched out at 8:00 p.m., but the data projected that the employee should have punched out at 5:30, it will automatically subtract 5:30 from 8:00 and the over allowed would be (2) two hours and (30) thirty minutes). However, Bob Pedulla's subordinate, Gary Cooper submitted a letter in my file on 12/05/01 prior to me being terminated. In that letter it shows 2.00 hours of time that was not accounted for. Basically Gary Cooper, the center manager, subtracted 2.00 hours from the total hours unaccounted for and came up with 1.74 over allowed which put me at a standard performance level.

From: Gary Cooper

To: file

Re: Talk with Rudy Cole

I reviewed Rudy's performance and service from 12/05/2001. I rode on car with Rudy during the entire day. Rudy's ran 3.74 late which included 2.00 hours inside time. Rudy normally does E.A.M.'S, but stayed for 2 hours on weds morning. The net result is 1.74 over allowed.

The computerized Morning Reports Bob Pedulla referred to has flaws that his subordinate clarified in the letter he drafted. One of the variables that was not taken into consideration when formulating the measurement of the assigned route was the E.A.M.'s

(**A.K.A. Early A.M.**). This position is a privilege job given to the highest seniority service provider, which consist of delivering packages before 8:30 a.m. This is not implemented in the "eight hour planned day." It was further discovered United Parcel Service had unlawful practice by encouraging younger drives to not take their lunches and breaks. On March 22, 2006, Neal Bidleman, my immediate supervisor at the time and the subordinate to Gary Cooper testified that, in fact, he and other employees did not take their lunches or breaks.

> "Q. Back when I was driving or back when you was supervising, was there – was there a time that you guys would write other drivers out when they come in early from lunches and breaks when they requested it?
>
> A. Yes.
>
> Q. So they didn't follow the luncheon break procedure?
>
> A. There was no luncheon break procedure in place at that time. They didn't do that until two years later where they enforced the lunch – add that half hour to your day. Then, they started enforcing the lunch procedures after the new law came."
>
> Q. Well, did you at any time ever run through my route without taking lunches and breaks?
>
> A. There is days when I did it, when I did it, when I didn't take the lunch, but the majority

> of the time I take lunch because I'm too hungry. I've got to eat.
>
> Q. I'm not talking about 15 minutes.
>
> A. Half hour, 45 minutes, whichever I take.
>
> Q. Well, Okay. Half an hour? So you didn't take the whole hour?
>
> A. No." pg. 12.

This was another variable that was not included in the calculations to measure the assigned route. In effect that would increase the over-allowed time while doing the route. In the Northern California Supplemental Agreement with United Parcel Service, the members are entitled to 1-hour lunch and 2-fifteen minute breaks.

> "The lunch period shall not be less than one-half (½) hour or more than one (1) hour in duration." page 42.

The calculations of the 1 hour and half meal period would explain the other portion of 1.74 over allowed. In reality the formula the United Parcel Service used is not accurate. If the calculations had flaws, and the United Parcel Service was aware of these flaws, then the testimony of Bob Pedulla has some integrity issues. One of the guidelines the U.S. Supreme Court lays out in *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317 (2000) is if the evidence shows the employers justification for termination is false it can be conceived as "unlawfully discriminated."

Neal Bidleman my immediate supervisor admitted that there were two other Service Providers had similar performance issues, under the age of 40, and still work for the United Parcel Service. This impacts work conditions under the A.D.E.A. § 621(1)(2).

The reason being, the expectations of the performance of age is not a factor in their calculations. In effect can place a great disadvantage for older employees in this section to retain employment with United Parcel Service until retirement. In reference to the case (*Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 355-56) one of his claims that the company retained two of the youngest of six workers and terminated the oldest two.

A.D.E.A. § 623(a). I was terminated for my age because of the two employees, including Neal Bidleman who are under the age of 40, and openly admitted that he does not take his personal time which does not reflect on his over allowance. The Ninth Circuit of Appeals ignored the fact there was evidence of a prima facie claim. *Schnidrig v. Columbia Machine, Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1966). The lower court agreed that the plaintiff only has to show little evidence to raise a genuine issue in discrimination cases. However, the Circuit Court of Appeals never looked at the evidence.

A.D.E.A. § 623(d). I submitted a letter to the Human Resource Department Chairman Eric Huffman April 6, 2002. The respondent was made fully aware of their intentions prior to me being terminated.

> "You do not know me but I am a driver in Oakland in the Broadway Center. I have been with UPS for 18 years. I am 43 years old and plan to retire with this company. I feel age is part of the reason I am experiencing so much harassment."

Lambert v. Ackerly, 180 F.3d 997 (9th Cir. 1999).

The United Parcel Service never disputed the fact that they were aware of the letter I drafted up prior to me being terminated. The weight of the evidence did meet the requirements under the A.D.E.A. § 623(a)(d) section in which the Ninth Circuit Court and lower courts did not "scour through the evidence" to discover respondent actions out with malice. If the courts believe it was not necessary to look at the evidence, how can the decision the Appellate Court made be fair?

September 11, 2001, United Parcel Service introduced information produced by the Diad Board, which was contrary to the C.B.A.

I have been employed with the United Parcel Service since October 1984 as a Service Provider. My daily job function was to deliver and pick up parcels for the employer. Also, I am to meet the essential job functions which is to solicit for business and to maintain communication with customers. United Parcel Service hired an agency to follow me while I was performing essential job functions with the public on February 18, 19 and 21, 2002. United Parcel Service took me off the job for alleged theft of time. My pending

discharge was subject to the grievance machinery under Article 7, § 4 in the Northern California Supplemental Agreement.

> "(b) In all cases, except theft, intoxication, use, sale, or possession of illegal narcotics and gross insubordination, each having occurred on the job, an employee to be discharged shall be allowed to remain on the job, with out loss of pay, unless and until the discharge is sustained under the grievance procedure. In suspension cases, the employee shall be allowed to remain on the job, with out loss of pay, unless and suspension is sustained under the grievance procedure." Page 21

I filed a grievance under Article 37 in Master United Parcel Service Agreement that states,

> "The parties agreed that principal of a fair day's work a fair day's pay shall be observed at all times and employees shall perform their duties in a manner best represents the Employer's interest. The Employer shall not in any intimidate, harass, coerce or overly supervised any employee in the performance his or her duties. The Employer will treat employee in the performance of his or her duties. The Employer will treat employees with dignity and respect at all times, shall includes, but not be limited too, giving due consideration age and physical condition of the employees. The employee will also treat each

> other as well as the Employer with dignity and respect. No employee shall be discipline for exceeding personal time base on data received from the Diad/IVIS or other information technology." Page 113, 114

September 11, 2003, United Parcel Service entered partially the information to the grievance panel (*Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976)). After the pending discharged case was heard, my employment was terminated.

Prior to September 11, 2003, I composed a letter to all parties involved in my pending discharge. John Perozzi and John Naddy, the laborer representatives for United Parcel Service responded to my request by only giving partially the information. The information that was absent the evidence shows that I was encouraged to perform my essential job functions as a Service Provider. The evidence also shows there was a sales representative for United Parcel Service, Chris Lucas, who rode with me to gain more business. They could not make a fair and just decision on September 11, 2003.

Another one of the decision makers, John Perozzi, had his creditability on July 7, 2006 came into question when he denied he was aware of the request after I was fired. The undisputed evidence demonstrated United Parcel Service concealed vital information to terminate my employment.

I filed a grievance under Article 37 under the United Parcel Service Master Agreement. In this

provision United Parcel Service cannot use any information from the Diad Board that would result into disciplinary action (*Vaca v. Sipes*, 386 U.S. 171 (1966)). I was not given an opportunity to exhaust the grievance procedure. This court noted that the intentions of Congress was not in any way to leave an injured employee without remedy under the grievance procedure. It is a material fact that United Parcel Service's actions were contrary to the C.B.A. This portion of the agreement did not have any "gray area" that will cause for an interpretation of the language in the C.B.A.

REASONS FOR GRANTING THE WRIT

The formula the respondent used does give the older persons or employees a great disadvantage in terms of retaining employment with United Parcel Service. The formula United Parcel Service used to calculate the measurement of the route were from younger employees who in fact violated the meal periods to get in earlier in which lowers the over-allowed time, like Neal Bidleman who was thirty years of age at the time he drove the route. These flaws come from the calculations that can affect a high volume of older persons being displaced by younger employees because it does not take into consideration of age. The Ninth Circuit of Appeals did not look at the effects of U.P.S. non-discriminatory policy implemented, in which it is contrary to Sections 621(1)(2) and 623(4)(a)(d) of Age Discrimination

in Employment Act of 1967. Even the United Parcel Service managers recognized the flaws as well. The question remains now why did the respondent withhold all the information from the Union and proceed to terminate me for alleged theft of time. Based on facts the respondent proceeded with malice and intent to withhold all pertinent information to utilize grievance machinery to justify their actions were in fact non-discriminatory (*Vaca v. Sipes*, 386, 171 (1966)). Bob Pedulla's and John Perozzi, the decision-makers' testimonies lacks creditability when they attempted to justify their actions. Fact one, Bob Pedulla's subordinates openly admitted that the formula used had flaws or did not input other variables. Fact two, John Perrozzi, the Laborer withheld information from the panel that showed my testimony given was in fact truthful. In the matter of Section 621(1)(2) and section 623(4)(a)(d) of Age Discrimination in Employment Act of 1967 and section 185(a) of Management Labor in Relation Act of 1947 were violated by circumventing the A.D.E.A. statute by using the C.B.A. to violate this section.

Respectfully submitted,

RUDOLPH COLE, Pro Se Litigant
22322 Mosselle Court
Hayward, CA 94541
(510) 537-3482

RUDOLPH COLE, PLAINTIFF- APPELLANT

V.

UNITED PARCEL SERVICE, INC,
DEFENDANT-APPELLEE

No.05-16678

D.C. No. CV-04-02866-CRB

United States Court of Appeals
For the Ninth Circuit

Submitted December 4, 2006

Appeal from the United States District Court
for the Northern District of California
Charles R Breyer, District Judge, Presiding

GOODWIN, LEAVY, and FISHER, Circuit Judges.

Rudolph Cole brought an employee discrimination action against United Parcel Services (UPS) for age, race, and retaliatory discrimination in violation of California's Fair Employment and Housing Act. Cole appeals the district court's grant of summery judgment in favor of UPS.

To establish a presumption of age, race, or retaliatory discrimination, a plaintiff must present a prima facie case of discrimination. See McDonnell Douglas Corp. V Green, 411 U.S. 792, 802 (1973); Brooks v. City of San Mateo, 229 F. 3d 917, 928 (9th Cir. 2000); Guz v. Bechtel Nat. Inc., 24 Cal. 4th 317, 354, 8 P.3d 1089, 1113, 100 Cal. Rptr. 2d 352, 378 (2000). Cole failed to establish a presumption of age or race discrimination because he was unable to show that he was performing his job competently or that

other similarly -situated people were treated more favorably. McDonnell Douglas, 411 U.S. at 802; Gruz, 24 Cal. 4th at 354, 8 P. 3d at 1113, 100 Cal. Rptr. 2d at 378. He failed to establish a presumption of retaliatory discrimination because he was unable to show a casual link between his protective activity and his termination. Brooks, 229 F. 3d at 928.

Even consuming Cole established a presumption of age, race, or retaliatory discrimination, UPS rebutted the presumption by providing a legitimate, nondiscriminatory explanation for Cole's termination. See id; Guz, 24 Cal. 4th at 355, 8 P.3d at 1114, 100 Cal. Rptr. 2d at 379. The explanation for Cole's termination placed the burden back on Cole to present substantial evidence that legitimate reason was pretextual. Brooks, 229 F.3d at 928; Guz, 24 Cal. 4th at 356, 8 P.3d at 1114, 100 Cal. Rptr. 2d at 380. Cole did not provide substantial evidence of pretext.

Because Cole was unable to proffer the necessary evidence to meet his evidentiary burdens, the district court properly granted UPS's motion for summery judgment.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUDOLPH D. M. COLE,

Plaintiff,

v.

UNITED PARCEL SERVICE,

Defendant,

No. C 04-02866 CRB

This employment discrimination action arrived from plaintiff Rudolph Cole's termination from his position as a package car driver for United Parcel Service ("UPS"). Plaintiff alleges that he suffered discrimination on the basis of his age and race, and was eventually terminated in retaliation for a letter he wrote to the alleged CEO of UPS. Now before the court is defendant UPS's motion for summery judgment. After carefully considering papers file by both parties, the court grants defendants motion for summery judgment.

BACKGROUND

I. Undisputed Facts

Cole began working for UPS as a package car driver in October, 1984. As a package car driver, Cole's duties included making deliveries to and picking up packages from UPS customers along a downtown Oakland route. Coe was a member of the Teamsters Union ("union"), and the collective bargaining agreement between UPS and the Union

governed the terms and conditions of Cole's employment.

Cole consistently failed to meet UPS's performance standards. His performance problems included: (1) consistently running 3 to 4.5 hours "overallowed"[1] on an almost daily basis; (2) working excessive overtime; (3) working over 12 hours without notifying the center; (4) chronic tardiness; (5) not following UPS's lunch and break policy; (6) security violation (e.g. he was cough leaving packages unattended on the sidewalk and leaving his vehicle unlocked when he entered a building to make a delivery); (7) safety violation (e.g. making illegal U-turns in busy intersection). Management and union representatives spoke with Cole multiple occasions about his performance, and repeatedly warned him that failure to improve his performance could lead to disciplinary action, including termination. Additionally, between May 1999 and February 2003 (Cole's last month of employment), UPS issued at least 27 disciplinary letters to plaintiff for his failure to follow UPS standards.

On April 6, 2002 Cole wrote a letter to Eric Huffman, who Cole addressed as the CEO of UPS. Mr. Huffman however, has never been UPS's CEO[2].

---

[1] "Overallowed" time is time taken is excess of the amount determined by UPS to by appropriate for a specific route.

[2] "At the time the letter was sent, Mr., Huffman was UPS's Corporate Human Relation Manager at UPS's corporate headquarters in Atlanta, Georgia

The letter outlined the various problems that Cole alleged to have with UPS including his belief that he was being targeted by UPS management because of his age and race. The letter asked Mr. Huffman to intervene and help Cole so as to improve conditions on the job and Cole's overall stress level. This letter also allegedly sent to eight other individuals including five managers from the East Bay district.

Also in mind-2002 UPS's East Bay District Manager instructed management employees to take steps to improve employee performance in the district. As a result, Bob Pedulla, the Oakland Package Division Manager, began to closely monitor his drivers through "Morning Reports" These reports are issued to management each day to identify, through objective criteria, the driver in each center who preformed the worse in thee specific categories the previous day.

The three categories: (1) the last driver to return to his/her center; (2) the driver who was most overallowed; (3) the driver who worked the most hours. While it is not unusual for satisfactorily performing drivers to be listed in one of these categories on occasion, a record of consistent listings suggest substandard performances. Cole's name repeatedly showed up on these morning reports. In fact, between February 2002 and February 2003, Cole's name appeared a total of 173 times. The driver with the next most occurrences appeared a total of 52 times. Further, not only did Cole's name appear on the morning reports more then any other driver in the

Oakland Division, it appeared more than any other driver in the entire East Bay District which spans form Napa to Bakersfield.

Because of Cole's poor record, UPS began to suspect that Cole was "stealing time" that is, he was taking personal time while on the clock of otherwise artificially inflating his work day in order to receive overtime pay. "Stealing time" is a terminable offence under the collecting bargaining agreement. UPS however, is not allowed to terminate drivers for theft based solely on suspicion. Therefore, UPS must conduct surveillance of any driver suspected of stealing time to determine whether the problem indicated by the statistical reports are intentional or unintentional and do to factors beyond the driver's control. Thus, UPS conducted a three day surveillance of Cole to determine if he was in fact "stealing time." On February 18, 19, and the 21, 2003, private investigators watched Cole deliver his regular route. The surveillance report, including video tapes, reviled that Cole took excess personal time while one the clock and manipulated the delivery information he recorded to cover up his delayed deliveries and time spent socializing. Additionally, on each of these days, Coe worked overtime and called to request assistance in completing his deliveries.

Following the last day of surveillance, management met wit Cole to discuss the surveillance findings, and to show him video tape clips that revealed him socializing rather than working. Cole was asked if he had any explanation for his behavior, but offered

none. At the Conclusion of the meeting, Pedulla decided to terminate Cole for theft of time and falsification of records.

II. Procedural History

Pursuant to the collective bargaining agreement between the Union and UPS, the Union automatically filed a grievance on the plaintiff's behalf challenging the termination. The joint Union-Management Grievance Panel considered the evidence an upheld the termination as being justified. On August 3, 2003, Cole filed a Charge of Discrimination of Fair Employment and Housing ("DFEH") alleging that UPS had discriminated against him on the basis of race and age, and retaliated against him for investigation of that matter, the DFEH issued a notice of case closure and a "no probable cause" finding.

Cole filed the present lawsuit on June 2, 2004 alleging age and race discrimination and retaliation.

DISCUSSION

I. Standard for Summery Judgment

Summery judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to judgment as a matter of law" Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence

for a reasonable fact finder to find for the non-moving party. See Anderson v. Liberty Libby, Inc.; 477 U.S. 242, 248-49 (1986). A fact is "material" if the fact may affect the out come of the case. *See id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio,* 125 F.3d 732, 735 (9th Cir. 1997). A principal purpose of the summary judgment procedure is to identify and dispose of factually unsupported claims. *See Celotex Corp. v. Cattrett,* 477 U.S. 317, 323-24 (1986)

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. *See id.* at 323. Where the moving party will have the burden of proof on an issue at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. *See id.* Once the moving party meets this initial burden, the non-moving party must go beyond the pleadings and by its own evidence "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment" *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.,* 55 F. 3d 247, 251 (7th Cir. 1995), and noting that it is not a district court's task to "scour the

record in search of a genuine issue of triable fact"). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *See Celotex,* 477 U.S. at 323.

The Ninth Circuit "has set a high standard for the granting of summary judgment in employment discrimination cases." *Schnidrig v. Columbia Machine, Inc.* 80 F.3d 1406, 1410 (9th Cir. 1996). When a plaintiff "seeks to establish a prima facie case [of discrimination] through the submission of actual evidence, very little such evidence is necessary to raise a genuine issue of fact regarding an employer's motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a factfinder." *Lowe v. City of Monrovia,* 775 F.2d 998, 1009 (9th Cir. 1985).

II. Plaintiff's Claim of Age and Race Discrimination in Violation of the FEHA.

A. The Parties' Respective Burdens

In considering employment discrimination claims, a burden-shifting test has been set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). See also Guz v. Bechtel Nat'l, Inc., 24 Cal.4th 317, 354 (2000). Under this test, the plaintiff bears the initial burden to establish a *prima facie* case of discrimination. Id. At 354-55. Assuming this is done, the burden shifts to defendants to show a legitimate nondiscriminatory reason for their actions. Id at 355. The ultimate burden then lies with plaintiff to prove

that the articulated reason is pretextual. Id. at 355-56.

B. Plaintiff Prima Facie Case

To establish a prima facie case of discrimination based upon age and/or race, an employee must show that: (1) he was a member of a protected class; (2) he was competently performing in the position held; (3) he suffered an adverse employment action; and (4) people outside the protected class with equal or lesser qualifications were given more favorable treatment. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 704-705 (9th Cir. 1993); *Guz v. Bechtel Nat'l Inc.,* 24 Cal. 4th 317, 355-356 (2000).

Although the burden for establishing a prima facie case in an easy one to satisfy, Cole fails to do so. While plaintiff's race and age make him a member of two protected classes, and his termination qualifies as an adverse employment action, he nonetheless fails the other two prongs of the *McDonnell Douglas* analysis. It is undisputed that Cole's performance consistently fell short of company standards and that he had engaged in conduct meriting termination under company policies. His name was present on the morning reports a total of 173 times in one year, and surveillance proved that he was taking excess personal time and manipulating his records to cover this up. He therefore fails the second prong of the *McDonnell Douglas* test.

Plaintiff also has not shown that other employees outside of the protected class were treated more favorably. He identifies three individuals whom he claims were treated better then him: John Edwards, Kevin Jones, and Steve Rodriguez. "It is fundamental that to make a comparison of a discrimination plaintiff's treatment to the of non-minority employees, the plaintiff must show that the 'comparables' are similarly situated in all respects." *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582 (6th Cir. 1992); *See also Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 658 (9th Cir. 2002). The individuals listed by plaintiff cannot be considered. comparators as none of he three had a record of consistently poor performance. In addition, other important factors distinguish these individuals from plaintiff. Mr. Edwards is not a package car driver; and as a member of management he is not subject to the employment standards laid out by the Collective Bargaining Agreement. Mr. Jones also does not drive package cars. Mr. Rodriguez has no disciplinary record and has consistently performed up to standards. Cole also lists a fourth individual, Marquel Pea, a younger driver who plaintiff claims was given additional stops when he replaced plaintiff while plaintiff was away from work. However, a driver who is given a greater burden cannot reasonably be thought of as having been treated more favorably.

Because defendant has not met his burden of demonstrating a prima facie case, defendant's motion for summary judgment regarding plaintiff's discrimination

claim is granted. However, even assuming, *arguendo,* that plaintiff had established a prima facie case, summery judgment would still be warranted because UPS has asserted a legitimate non-discriminatory reason for termination Cole and plaintiff has failed to demonstrate pretext.

C. Defendant's Non-Discriminatory Explanation for Plaintiff's Termination

Ups asserts that Cole's poor record evidenced by the morning reports, along with the surveillance footage, are proof that they had a legitimate non-discriminatory explanation for plaintiff's termination. The operational reports confirm that Cole was the worst-performing out of 1250 package car drivers in the East Bay District. These are objective criteria that have not and cannot be refuted by Cole. Thus, UPS has articulated a legitimate, non-discriminatory explanation for terminating Cole.

D. Plaintiff's Proof of Pretext

In order to survive summary judgment, plaintiff must come forward with specific and substantial evidence that UPS's reasons were pretextual. *See Aragon v. Republic Silver State Disposal, In.*, 292 F3d 654, 659 (9th Cir. 2002). "[A] plaintiff can prove pretext in two ways; (1) indirectly, by showing that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable, or (2) directly, by showing

the unlawful discrimination more likely motivated the employer." *Chuang v. University of California Davis, Board of Trustees,* 225 F. 3d 1115, 1127 (9th Cir. 2000) (citation omitted). to him, Plaintiff respond; "Not that I can recall now." Nor has Cole created an inference of discriminatory purpose by showing that other similarly situated individuals outside of the protected class were treated differently. As discussed above, Cole has failed to identify any individual with a comparable record who was treated more favorably. Finial, Cole has provided no evidence challenging the veracity of UPS's stated reasons for terminating him.

Cole has failed to demonstrate an issue of material fact requiring trail. Therefore, summary judgment in the defendant's favor is appropriate.

III. Plaintiff's Claim of Retaliation In Violation of Fair Employment and Housing Act

A. The parties' Respective Burdens

To make prima facie claim of retaliation, a plaintiff must show "(1) involvement in a protected activity, (2) an adverse employment action and (3) a casual link between the two," *Brooks. v. City of San Mateo,* 229 F.3d 917, 928 (9th Cir. 2000). *See also Morgan v. Regents of University of California,* 88 Cal. App.4th 52 (2000). With respect to the find out the third element, the Ninth Circuit has explained that "[t]o show the requisite causal link, the plaintiff must present evidence sufficient to raise the inference that the protected activity was the likely reason for the

adverse action . . . Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 706 (9th Cir. 1982).

Once a plaintiff has met his prima facie burden, the burden of production shifts to the employer to present legitimate reasons for the adverse employment action. *See Brooks,* 229 F.3d at 928. "Once the employer carries this burden, plaintiff must demonstrate a genuine issue of material fact as to whether the reason advanced by the employer was a pretext. Only then does the case proceed beyond the summary judgment stage." *Id.* "'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507 (1993).

B. Plaintiff's Prima Facie Case of retaliation

Cole claims that he was terminated in retaliation for a letter he wrote on April 6, 2002 complaining about the discrimination the Eric Huffman, the supposed CEO of UPS. Plaintiff can prove the first two requirement for establishing a prima facie case: he was engaged in the protected activity of writing a letter to complain to his employer, and he suffered an adverse employment action when he was terminated. However, he fails to present evidence establishing a causal link between the two.

Cole sent the letter to eight additional individuals other than Huffman. However, he did not send an letter to Bob Pedulla, the manager that terminated him. Plaintiff claims that the letter he sent to Zack Scott, the East Bay District manage, is evidence of discrimination. However, Cole provides no evidence that Scott took part in the decision to terminate him or that Scott told Pedulla about the letter. As plaintiff has not presented any evidence of causation, he fails to establish a prima facie case of retaliation.

C. Defendant's Legitimate Reasons for Plaintiff's Termination

UPS has shown through direct evidence that Cole has a history of poor performance with both surveillance and constant objective morning reports. Furthermore, Cole's direct manager Bob Pedulla, had no knowledge of this letter. Therefore, it is clear that UPS had legitimate reasons for Cole's termination.

D. Plaintiff's Proof of Pretext

Assuming *arguendo* that Cole established a prima facie case, Cole presents no evidence that UPS's reasons for his termination were pretext for their retaliation. Therefore, Summery judgment on this claim is granted.

CONCLUSION

For the forgoing reasons, Defendant's motion for the summery judgment is GRANTED.

IT IS SO ORDERED.

Dated: July 27, 2005

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUDOLPH COLE, Plaintiff-Appellant, v. UNITED PARCEL SERVICE, INC., Defendant-Appellee.	No. 05-16678 D.C. No. CV-04-02866-CRB ORDER (Filed Feb. 16, 2007)

Before: GOODWIN, LEAVY, and FISHER, Circuit Judges.

Appellant's petition for panel rehearing is denied.

No further filings shall be accepted in this closed appeal.